SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, and BARBARA BRENNAN,

Intervenor-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE LONG ISLAND CONFERENCE OF RELIGIOUS ELEMENTARY AND SECONDARY SCHOOL ADMINISTRATORS (LICRESSA), *AMICI CURIAE* IN SUPPORT OF APPELLEE AND INTERVENOR-APPELLEES

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Interest of the *Amici Curiae*

The Long Island Conference of Religious Elementary and Secondary School Administrators (LICRESSA), the *amici curiae* submitting this brief, are the chief administrators of voluntary, non-profit, full time, accredited, religious elementary and secondary schools in Long Island offering State approved curricula. The Conference is composed of the Lutheran High School Association, the Hebrew Day Schools, the Episcopal Schools, Diocese of Long Island, and the Education Department of the Roman Catholic Diocese of Rockville Centre. It is believed to be the first organization of its type in the nation. Its accredited religious elementary and secondary schools have a combined enrollment in excess of 100,000 children, who attend these schools under New York's compulsory education law.

The prime purpose of the Conference is that its members may meet, plan and work cooperatively with each other and with public educators in the common interest of furthering excellence in education for all children. The spirit of the Conference is reflected in its cooperation with public educators in educational and community problems of common concern. The Conference has pioneered in advancing inter-faith understanding and is living proof that religiously affiliated education is not a divisive force in our society but can be a major force in producing inter-religious harmony.

The Conference is particularly interested in the instant case because this appeal questions the right of approximately one-half million New York children in religiously

oriented independent elementary and secondary schools to share in the benefits of the State Textbook Loan Law. Appellants really seek a decision by this Court that Conference schools are somehow not schools at all, but churches. As educators we are doing the same educational job as public school educators. In addition, we find a place in our curricula and time in our school day for religious training. This hardly transforms our schools into churches.

All New York children must attend a public or accredited private school under the State's Compulsory Education Law. The school commands the greatest part of the child's day and learning time. When we add religious training to the school curricula, we do not thereby constitutionally taint our whole educational fabric. We simply provide a necessary supplement to educate the whole child.

New York school children—in both public and private schools—take a common examination for New York State Regents' Scholarships. There are no religious questions asked on these examinations. They test secular knowledge only, yet our children do well and earn their proportionate share of Regents' Scholarships. We like to feel that this is a result of the quality of the secular educational job we are doing.

This case is of far reaching importance not only to children in religiously oriented independent schools and their parents, but to citizens everywhere interested in improving the quality of education of all children as the welfare of the State and Nation requires. Reasonable state measures, within the limits of the Constitution, to assist

school children, including those in religiously oriented schools, should be favored.

Prior to enactment of the statute challenged here public school authorities were not required to purchase or loan textbooks to their pupils. On many occasions parents of children in New York public schools found themselves in difficulty because they had failed to provide textbooks for their children. There has never been any obligation on the part of a private or independent school, religiously affiliated or otherwise, to furnish textbooks. Since neither public nor private schools were under any mandate to furnish textbooks, the amendment of the statute to provide for the free loan of textbooks to all children actually provided no aid to either public or private schools. The aid provided by the amendment was clearly for the children and, of course, their parents who would otherwise have been required to purchase the textbooks.

Students now in public schools and in secular private schools, regardless of wealth, are granted the free loan of textbooks. Appellants insist that children enrolled in our Conference schools be singled out solely because of such enrollment and denied the free loan of a public school approved textbook. When this is done, clearly an unwarranted religious test has been imposed to condition the grant of a public benefit.

We firmly believe that the New York Textbook Loan Law does not constitute an establishment of religion but is a proper exercise of State concern in educational matters.

For these reasons we have obtained the written consent of all parties to this case to file a brief *amici curiae* herein in support of the constitutionality of the New York Text-

book Loan Law and pursuant to such consent we have directed counsel to prepare and file this brief.

Summary of Argument

Establishment determines this case.

If no Establishment be found then appellants' Free Exercise claims are baseless. Appellants concede as much (BR 27, 28).

The specific problem posed by the case at bar is whether secular textbooks cease to be secular simply because they are read and used in a school that also teaches about God. Appellants' test in effect would impose a Constitutional Quarantine on accredited schools that are religiously affiliated. Nothing in the First Amendment requires such hostility to religion. There is no Jewish multiplication table. There is no Protestant alphabet. There is no Catholic law of gravity. The books that teach these and other secular subjects do not become religious books merely because of the location of their use. It would appear to be a novel doctrine, to say the least, if the site of the use of a textbook became the determinative constitutional element.

Appellants find no evidence in the record of benefit to any schools or of any abuse of the New York Textbook Loan Law. They base their attack solely on a type of "transitory unconstitutionality"—a sort of "guilt by association"—that places the religiously oriented school legally "off-limits." There is no more to their position than that; for there is no constitutional infirmity in the children who are the recipients of the textbook loan; nor in the textbooks themselves, the contents of which remain

unchanged; nor in the use to which they are put—to acquire knowledge of the secular subjects mandated by State curricular requirements. Appellants' argument is that as a secular textbook is carried up the steps and into a Hebrew day school—a substantial change in its essence occurs—and somehow it becomes a religious tract. We assume the principle would apply in like manner to the transport of a book obtained on loan from a public library to a parochial school classroom or, let us assume a pupil enrolls in a public or private secular school and requests and receives the free loan of secular textbooks. Then, the day before the school year commences let us say he transfers his enrollment to a parochial school which accepts the same textbooks. Appellants' theory would mandate that this transition requires the surrender of the textbooks to which the student was otherwise entitled the previous day. In apparent recognition of the basic weakness in this approach, appellants pose hypothetical situations wherein abuses of the legislative purpose may occur. On such grounds most statutes could not survive constitutional scrutiny.

There is nothing in the doctrine of neutrality required of the State in the area of First Amendment freedoms which prevents accommodation to the religious needs of our people. Indeed the contrary may be true when freedom of speech and religion are involved as pointed out by Mr. Justice Goldberg in *Abington* v. *Schempp*.

> "It is said, and I agree, that the attitude of the State toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-in-

volvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive or even active hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

Abington School District v. *Schempp* and *Murray* v. *Curlett,* 374 U.S. 203, 306.

Mr. Justice Harlan, Justice White concurring, voiced a similar thought dissenting in *Sherbert* v. *Verner* decided the same day as *Schempp*:

"The constitutional obligation of neutrality (citing Schempp) is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all embracing secularism."

Sherbert v. *Verner,* 374 U.S. 398, 422.

Appellants' view of permeation raises this interesting question:

If our Conference schools are held to be so permeated with religion that they are more churches than schools then should not the monies parents expend to support them be properly deemed church contributions, fully deductible on their income tax returns?

Obviously a line must be drawn somewhere. We say let it be drawn in a way which accords the fullest freedom of action to the sovereign State of New York in the discharge

of its interest and obligation, *parens patriae,* in the care and education of all of its children. The Statute is entitled to the presumption of constitutionality with which all such legislation is favored. It should not be invalidated on constitutional grounds unless its infirmities are unmistakable and not, as here, hidden in hypotheses and assumptions based upon extreme theories of separationism.

The right to be free in thought and belief, the right to equal protection of the laws and to share in the benefits of a public welfare Statute are personal rights. They do not inhere in schools, churches, synagogues or institutions. Here, as in the racial desegregation cases, it is the individual child who is entitled to be treated equally before the law. Children are compelled under the Compulsory Education Law of the State to attend accredited schools. There should be no religious test on a child's right to receive the loan of a public school textbook to aid him in acquiring knowledge of a secular subject mandated by State directed curricula.

ARGUMENT

POINT I

The inclusion of religious instructions in its curricula does not transform a school discharging the primary function of providing a state approved and state mandated education into a church.

The preamble declaring the Legislature's purposes in enacting the amendment to Section 701 of the New York Education Law to provide for the free loan of textbooks, states:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." N.Y. Sess. Laws 1965, Ch. 320, #1.

The education of its citizens is the legitimate concern of the State and the State has the right to lend its aid to all its citizens who attend schools which satisfy the State's

educational requirements. *Pierce* v. *Society of Sisters*, 268 U.S. 510. It is the legislative purpose and the primary effect of programs supported by public funds that is controlling. If the funds are used to benefit the State and the student in the accomplishment of lawful State objectives, the use is constitutionally proper and any incidental effect which happens to coincide or harmonize with the aims of any or all religions is not an aid to religion or the financing of a religious group, or support of the religious function in the constitutional sense. To say that the State cannot provide for the free loan of a public school approved secular textbook to a child attending a State accredited school solely because that child is enrolled in a religiously affiliated school would result in a constitutional interpretation of hostility to religion, rather than one of mere separation of church and state.

Appellants assert "there is no such thing as secular education in a sectarian school because the whole curriculum is permeated by religion" (Br. 7). Aside from the fact that this is an unproved assumption, every school is permeated with a "religion,"—at least in the sense of value-inculcation.

In 1962 the Disciplines Seminar of the National Education Association published a booklet entitled *The Scholars Look At The Schools*. The broad definition of religion used in this publication is identical with the one employed by this Court in *Torcaso* v. *Watkins*, 367 US 488. On page 18 one reads the following in *The Scholars Look At The Schools*:

> "Religion, in this sense, is defined as that which is one's 'ultimate concern,' to use Paul Tillich's phrase, or, according to Enrich Fromm, that which is one's 'life orientation.' The teaching of a religious attitude, from

this standpoint, is inescapable in any school. There is no teacher, no school which can escape the problem of life orientation, the ultimate commitments by which every person must live. Every analysis of life and culture must take account, either implicitly or explicitly, of those fundamental commitments which underlie every human action. This is precisely the domain of religion. Democracy, communism, and the various economic systems cannot be analyzed in their most profound dimensions without getting into the question of ultimate values. This is, finally, a religious question.

Thus, we teach religion in the schools, whether we would or not."

To the same effect is this statement:

"Commitments, or values, are both taught and caught. They are everlastingly expressed and implied in the child's environment—in school and out. They literally permeate the public school." ("Religion in the Public Schools" published by the American Association of School Administrators, 1964, p. 63.)

The plain fact is that a school is a school and not a church when it is providing, as a primary function, a State mandated general education. Religious permeation, as appellants describe it, whether in public or non-public schools, is constitutionally irrelevant in such event.

POINT II

The New York Textbook Loan Law does not violate the Establishment Clause of the First Amendment.

The Textbook Loan Law furthers the public welfare by providing for the free loan of public school approved secular textbooks to all seventh to twelfth grade children in the State to improve the quality of secular education.

Section 1 of the Statute, here under attack, provides in part:

> "It is hereby declared to be the public policy of the State that the public welfare and safety require that the State and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state" (A. 63).

Since the purpose and effect of the Statute appear proper and within the power of the legislature to achieve, our scrutiny must then be directed to the means set forth in the Statute to gain these objectives in order to determine whether the enactment violates the Establishment Clause of the First Amendment.

The means are composed of several elements as follows:

(a) Textbooks are to be purchased with public funds with ownership remaining in the public school district.

(b) The textbooks are to be strictly non-sectarian and only those designated or approved by public education authorities.

(c) Textbooks are to be loaned to students on individual request.

What is the effect produced thereby?

The student benefits by receiving an aid to education in State approved subjects. The State benefits thereby because the "imbalances in our educational programs" regarding such subjects is alleviated.

But what of the schools themselves: are they aided in a manner which violates the First Amendment?

It is quite clear that there is no direct benefit, or aid to the schools under this program. The record before this Court is bare of a scintilla of evidence of even any indirect aid or benefit to the schools. Indeed, there is opposing evidence that in the past all of the intervening parents (and others similarly situated) purchased at their own expense, the textbooks which their children had been using (A. 13-15). They, and their children, are the only beneficiaries, directly or indirectly, of the provisions of the Textbook Loan Law. The speculations of appellants to the contrary in this regard (BR 7) are wholly unsupported.

In view of the clear language and effect of the Textbook Statute the Court below held that it did not violate the provisions of Article XI, Section 3, of the New York State Constitution, commonly known as the Blaine Amendment, which has long been considered to be more restrictive in its provisions than the Federal First Amendment (A. 65).

This Court has interpreted the No Establishment Clause with respect to government aid to religion in:

Bradfield v. *Roberts*, 175 US 291;
Cantwell v. *Connecticut*, 310 US 296;
Everson v. *Board of Education*, 330 US 1;
McCollum v. *Board of Education*, 333 US 203;

Zorach v. *Clauson*, 343 US 306;
McGowan v. *Maryland*, 366 US 420;
Engel v. *Vitale*, 370 US 421;
Abington School District v. *Schempp*, 374 US 203.

We assume that the relevant principles of these cases will be reviewed fully in the main briefs and we shall only comment briefly on them here. They hold that the Establishment Clause means at least the following:

Religious institutions performing a public function can be aided by government. *Bradfield* v. *Roberts*.

The provisions of the Establishment Clause are applicable to the states by the Fourteenth Amendment. *Cantwell* v. *Connecticut*.

Public services and social benefits "indisputably marked off from the religious function" may be provided by government to pupils in attendance at religiously oriented schools. *Everson* v. *Board of Education*.

The conduct of sectarian indoctrination on public school premises under supervision of public school authorities violates the Establishment Clause. *McCollum* v. *Board of Education*.

The First Amendment does not forbid all cooperation between religion and State. A program of public school released time sectarian education is a permissible accommodation to the spiritual needs of our people. *Zorach* v. *Clauson*.

Statutes whose reason or effect merely happen to coincide or harmonize with the tenets of some or all religions

do not violate the Establishment Clause. *McGowan* v. *Maryland.*

Prayers and religious services in public schools are banned. *Engel* v. *Vitale.*

To withstand the strictures of the No Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Abington School District* v. *Schempp.*

That the instant case meets the *Abington* test is recognized by Mr. Justice Staley, Jr., in his decision in the Court below (27 AD 2d, 69, 80; A. 59-60):

> "Chapter 320 does not involve affirmation by the state of religious beliefs, nor religious activities within the public schools. The Statute is completely neutral with respect to religion, since it merely makes available secular textbooks to requesting students, regardless of the schools they attend. It completely meets the test for constitutionality under the First Amendment as stated by the United States Supreme Court in Abington School District v. Schempp, 374 US 203, 222."

While *Cochran* v. *Louisiana Board of Education,* 281 U.S. 370, did not involve an interpretation of the Establishment Clause it is similar in its facts to the case at bar. It concerned a Louisiana statute providing for State supply of secular textbooks to children attending religiously oriented schools.

In clearly distinguishing the public aspect of parochial education from its private or religious aspect, the Court held that whatever benefit might accrue to the school or institution from the aid given, was incidental to the public

benefit to the pupil and the State and was, therefore, constitutionally without significance. Chief Justice Hughes wrote the opinion for a unanimous Court. In affirming the holding of the Louisiana Supreme Court he quoted a portion of that Court's opinion as follows:

> "The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished to them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children of the state, alone are beneficiaries." *Id.* at pp. 374-375.

Earlier in this brief, we examined the provisions of the Textbook Loan Law and demonstrated that:

1. The purpose of the Statute is to "correct imbalances in our educational programs" by increasing education in State approved subjects. (Statement of Legislative policy, *supra.*)

2. The primary effect is to further the public welfare and safety by increasing the educational opportunities to the youth of the State thereby increasing intellectual skills and resources which are important to the national defense and the general welfare of the State.

As stated in *Cochran,* the statute does not isolate parochial school pupils as its beneficiaries. Its interest is edu-

cation, broadly; its methods comprehensive. Individual interests are aided only as the common interest is safeguarded. 281 US 370, 375.

The total aim and effect of the statute is to improve the education of all children in secular subjects. It neither advances nor inhibits religion and is thus in accord with the neutrality required of the State in the balance of power between individual, Church and State struck by the First Amendment. *Zorach* v. *Clauson,* 303 NY 161, aff'd 343 US 306.

Whenever it is contended that a certain State act, such as the Statute questioned herein, is in aid of the establishment of religion, the obverse side of the coin must perforce be examined, lest in striking down the proposed act the right to freedom of religion be destroyed. *64th Street Residences, Inc.* v. *New York,* 10 Misc. 2d 841, 173 NYS 2d 700, aff'd 5 AD 2d 824, 170 NYS 2d 993, aff'd 4 NY 2d 268, cert. den. sub nom., *Harris* v. *City of New York,* 357 US 907 (1958).

Everson v. *Board of Education* (*supra*) expressed the determination of this Court not to "inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious beliefs."

This holding, we submit, gives full effect to both parts of the religious clauses of the First Amendment and emphasizes the ultimate value to be protected—*Religious Liberty.*

CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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